

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of Atlantic Satellite Corporation, Inc.)	
Seeking a Declaratory Ruling that a Zoning)	File No. SAT-DRZ-19991216-00124
Ordinance of the Town of Orangetown, New York)	
is Preempted Pursuant to Section 25.104 of the)	
Commission Rules.)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: September 1, 2000

Released: September 5, 2000

By the Chief, International Bureau:

1. By this Order we grant a petition filed by Atlantic Satellite Communications, Inc. (“ASCI”) requesting us to preempt the zoning restrictions of the Town of Orangetown, New York (“Orangetown”) pursuant to Section 25.104 of the Commission’s Rules.¹ The Orangetown Zoning Board of Appeals (“Zoning Board”) denied ASCI’s request to replace and relocate an antenna on its commercial property, and to construct a new antenna that exceeds Orangetown’s size limitations for satellite earth station antennas.² We find that the Zoning Board’s application of the ordinance in this case obstructs the federal interest in ensuring easy access to satellite delivered services. Consequently, we preempt Section 8.14 of the Town Code of Orangetown to the extent that it applies to ASCI’s application.

BACKGROUND

2. The Commission is charged with promulgating rules that, among other things, promote the federal interest in ensuring easy access to satellite-delivered services.³ Section 25.104(a) of the Commission’s rules, which applies to satellite earth station antennas with a diameter greater than two meters, states that any local zoning regulation that materially limits transmission or reception by earth station antennas, or imposes more than minimal costs on users of such antennas is preempted unless the promulgating authority can demonstrate that such regulation is reasonable.⁴ ASCI contends that Orangetown’s zoning restrictions are unreasonable under this rule and should be preempted. Orangetown disagrees.

¹ Petition for Declaratory Ruling, fled by Atlantic Satellite Communications, Inc. on December 16, 1999, File No. SAT-DRZ-19991216-00124 (“*ASCI Petition*”).

² Town of Orangetown Code Book (“Orangetown Code”) Chapter 43, § 8.14.

³ See Preemption of Local Zoning regulation of Satellite Earth Stations, IB Docket No. 95-59, *Report and Order and Further Notice of Proposed Rulemaking*, (“*Preemption Order*”) 11 FCC Rcd. 5809, 5809 (1996).

⁴ 47 C.F.R. § 25.104(a).

3. ASCI owns and operates broadcast-quality antennas used to provide national and international broadcast services to the public through programming providers. ASCI also uses its antennas to receive unedited news footage which is then transmitted, via fiber optic cable, to news services. The news service edits the footage for broadcast and returns this footage to ASCI for satellite transmission to their affiliates.⁵ Viewer programming includes news, ethnic broadcasting, children's programming, and national and local sporting events. For its operation, ASCI leases six acres of property in an area zoned light industrial business.⁶ ASCI operates three antennas on this site. ASCI states that it needs to replace the existing antenna and adding the new antenna to serve a growing public interest and demand for programming.⁷

4. Section 8.14 of the Orangetown Zoning Code governs the placement and number of satellite antennas located in the Town. The rules limit the size of earth station antennas to a dimension of twelve feet high, wide and deep. It also limits the maximum number of satellites to one per lot.⁸

5. In January 1999, ASCI appeared before the Orangetown Planning Board seeking a permit to (1) replace an existing antenna of 5 meters with an antenna of 7 meters and relocate the antenna to another area of ASCI's property and (2) construct a new antenna measuring 31 feet high, 42 feet wide and 16 feet deep. These modifications would increase the total number of satellites on the property to four.⁹ In February 1999, the Planning Board granted preliminary approval of ASCI's request. The Planning Board determined that ASCI's request would not have a significant impact on the environment, nor would it have an impact on the aesthetics, agricultural or cultural resources of the neighborhood. The Planning Board also stated that the proposed action is consistent with Orangetown's master plan and would have no "adverse economic or social impact upon [Orangetown] or its business or residences."¹⁰

6. ASCI's proposal was then referred to Orangetown's Zoning Board for a variance of the ordinance.¹¹ In July 1999, the Zoning Board denied ASCI's request. The Board's grounds for denial included: that the requested variance would produce an undesirable change in the character of the neighborhood; that ASCI failed to demonstrate that the signals from existing facilities were not satisfactory and that ASCI does not assert that it cannot retain existing customers; and that ASCI had not committed that it would not make further requests to increase the size of the antennas.¹²

⁵ Orangetown Response to Petition for Declaratory Ruling, Exh. B at 13 ("*Orangetown Reponse*").

⁶ *ASCI Petition* at 2.

⁷ *ASCI Petition* at 2.

⁸ Orangetown Code, Section 8.14 (D)(2) and (G)(8).

⁹ ASCI's three existing satellite antennas were in place before the Ordinance went into effect and thus the Ordinance provides that they are "legal non-conforming structure[s]." Orangetown Code, Section 8.14(K).

¹⁰ *ASCI Petition*, Exhibit B at 2.

¹¹ Although the Planning Board may grant permit approval, the Zoning Board has exclusive jurisdiction to grant variance requests. *Orangetown Response* at 12.

¹² *ASCI Petition*, Exh C.

7. In its petition, ASCI asserts that the local zoning regulation is not reasonable as defined by Section 25.104.¹³ The preamble to the ordinance states that the purpose of the zoning limitation is “to further the health, safety and welfare of the citizens of the Town of Orangetown.” ASCI asserts, however, that the ordinance does not explain how the zoning limitations on satellite antennas serve any of these health and safety objectives.¹⁴ ASCI further states that the ordinance sets rigid and arbitrary limitations on the size and the location of antennas and, as a result, the regulation has impaired its ability to compete and remain economically viable in the community.¹⁵

8. Orangetown responds that Section 8.14 is not preempted because the ordinance explicitly states an aesthetic objective and this information is readily available to antenna users. Additionally, Orangetown asserts that the ordinance is in accordance with Section 25.104 in that it is reasonable, does not materially limit satellite transmission and reception, nor harms ASCI’s ability to compete in the marketplace. According to Orangetown, the aesthetic purpose in limiting antenna size is appropriate because the bulk and visual impact of the antennas lower property values.¹⁶ Orangetown further states that legal precedent has consistently recognized that aesthetics are valid subjects for zoning ordinances and land use administration.¹⁷ Finally, Orangetown argues that any adverse ruling by this Commission would impair its ability to adopt aesthetic regulations in the future.¹⁸

DISCUSSION

9. Section 25.104(a) of the Commission’s rules preempts local zoning regulations that “materially limit” access to earth stations with diameters larger than two meters unless the promulgating authority can demonstrate the regulation is “reasonable.”¹⁹ Consequently, the Commission must first decide whether the ordinance materially limits reception or transmission. If so, Orangetown bears the burden of proving that the limitations are reasonable.²⁰ The local regulation may not unnecessarily burden federal interests.²¹

¹³ *ASCI Petition* at 9.

¹⁴ *ASCI Petition* at 6.

¹⁵ *Id.* at 7.

¹⁶ *Orangetown Response* at 5.

¹⁷ *Id.* at 5-9.

¹⁸ *Id.* at 16.

¹⁹ 47 C.F.R. § 25.104.

²⁰ The record indicates that ASCI has “exhausted all non-federal administrative remedies” as required for Commission review. In addition, prior to filing its request for a Declaratory Ruling, ASCI filed a Petition with the Supreme Court of N.Y. appealing the zoning restriction imposed by Orangetown. This action has been stayed pending the Commission’s resolution of this action. See *Atlantic Satellite Communications, Inc. v. John Duffy et al.*, Index No. 5951/99, Supreme Court, State of New York, Trial/Special Term Part, Rockland County.

²¹ *Preemption Order*, 11 FCC Rcd at 5818.

10. The federal interest here is to ensure that users have access to satellite signals, and to promote fair and effective competition among communications service providers. ASCI states that due to increased competition and changing technologies, it needs to construct and operate a new antenna to meet accepted broadcast quality standards, and remain economically viable in the market. ASCI informed the Zoning Board that its clients had requested an antenna of the size proposed to combat atmospheric conditions that significantly impair reception and quality.²² ASCI also states that it needs the additional antenna to serve new customers. Due to its current limited capacity, ASCI states it has had to turn down requests for services from three major networks and has lost the opportunity to secure new clients. In support of this assertion, ASCI submitted copies of Requests for Proposals from several major networks and its responses stating it could not accommodate their satellite communication link requests due to technical limitations.²³ ASCI states that without the new antenna it will lose revenue, both from new contracts and existing clients who take their business to competitors able to provide improved services.²⁴

11. Orangetown counters that ASCI has not demonstrated that the existing antennas cannot transmit quality signals to satellites.²⁵ Orangetown also states that ASCI's claim of a growing public demand is nebulous and its assertion that it would lose money is vague. In addition, Orangetown claims that ASCI has not referenced any competitors that have benefited from ASCI's lack of capacity.²⁶

12. We find that the Orangetown ordinance materially limits ASCI's ability to provide existing customers with improved services and prohibits ASCI from gaining new customers. Contrary to Orangetown's claims, ASCI has demonstrated that increased competition and changing technology necessitate its relocating an antenna and constructing the proposed additional antenna on its site. ASCI's proposal seeks to utilize developments in the satellite earth station industry and to serve the growing public demand with the latest technological advances. Simply maintaining its current technical capabilities with its existing satellites will not allow ASCI to remain competitive. As a result, the application of the ordinance discriminates against satellite technology vis-à-vis competing technologies. Accordingly, we find that the Orangetown ordinance materially limits the reception and transmission of earth station antennas.

13. Next, we must determine whether Orangetown has met its burden of demonstrating that the limitation is reasonable. For purposes of this rule, "reasonable" means that the local regulation: (1) has a clearly defined health, safety, or aesthetic objective that is stated in the text of the regulation itself; and (2) furthers the stated health, safety or aesthetic objective without unnecessarily burdening the federal interests in ensuring access to satellite services and in promoting fair and effective competition among competing

²² *Orangetown Response*, Exhibit B at 18.

²³ Atlantic Satellite Communications, Inc., Reply to Response to Petition for Declaratory Ruling, ("*ASCI Reply*") filed July 12, 2000, at 6 and Exh. C and D.

²⁴ Atlantic Satellite Communications, Inc., Supplement to Petition for Declaratory Ruling filed July 10, 2000. This supplement was filed pursuant to a staff request. *See* Letter to Jason S. Roberts, Esq., Counsel for ASCI from Rosalee Chiara, Deputy Branch Chief, Satellite Policy Branch, dated June 23, 2000.

²⁵ *Orangetown Response*, at 11.

²⁶ Town of Orangetown Response to ASCI Supplement, p. 2. *See* Letter to Magalie Roman Salas, Secretary FCC, from James K. Riley, Orangetown Town Attorney, dated July 26, 2000. ("*Orangetown Response to Supplement*").

communications service providers.”²⁷ Orangetown did not rely on health or safety reasons for denying ASCI’s request. Rather, it offered several aesthetic grounds for denying ASCI’s proposal.²⁸ While the Commission recognizes that aesthetics are a permissible regulatory objective, Orangetown is obligated to define those objectives. In this case, the ordinance states that the controls contribute to a “good appearance” of the town and stabilize property values.²⁹ Orangetown states that ASCI’s proposal to add an “extremely large” commercial satellite antenna would negatively impact property values nearby because of adverse aesthetics.³⁰ We note, however, that ASCI’s facility is located on a six-acre lot in an area zoned for light industrial use.³¹ The record shows that this site consists of the earth station antennas and a primary building.³² The dishes are located to the south of the building, which borders another area zoned as light industrial. There are other commercial buildings and a railroad track on the lot’s western and eastern sides respectively. Finally, the primary building and trees screen the view of the antennas to the residential neighborhood to the north.³³ Thus, Orangetown has failed to demonstrate that application of the ordinance in this case furthers an aesthetic objective.

14. Further, although the ordinance refers to property values as a reason to impose controls, Orangetown has failed to provide any factual support for its assertion that granting the variance will have a negative impact on nearby residential property. The Commission does not regard testimony by non-party, neighboring property owners to be reasonable in assessing an antenna application or variance request.³⁴ In addition, Orangetown’s suggestion that ASCI consider alternative sites does not sustain its burden to show the ordinance is reasonable. The property is zoned for commercial use, and Orangetown does not oppose ASCI’s use of the property for signal reception and transmission for business purposes.

15. The Orangetown ordinance may not burden the federal interest in promoting fair and effective competition in a variety of communications services, including satellite services. We find that Orangetown’s ordinance, as applied to ASCI’s request precludes ASCI’s ability to meet its business demands and compete with emerging technologies thereby burdening the federal interest in ensuring access to satellite services.

²⁷ 47 C.F.R. § 25.104(a)(1) and (2).

²⁸ *ASCI Petition*, Exh. C at 2.

²⁹ Orangetown Code, Section 8.14(A).

³⁰ *Orangetown Response*, at 5.

³¹ *ASCI Reply*, at 4.

³² *Id.*

³³ *Id.*

³⁴ Petition of Willie and Chun Ok Brown seeking a Declaratory Ruling that a Zoning Ordinance of Burlington, NJ is Preempted Pursuant to Section 25.104, *Report and Order*, 12 FCC Rcd 9626, 9628 n. 10. The majority of public testimony contained unsupported assertions regarding *safety* concerns from electromagnetic radiation emitted by satellite antennas. Nonetheless, the record indicates that Orangetown’s action was based on aesthetic grounds and not safety concerns. *Orangetown Response*, Exh. B at 51-57.

CONCLUSION

16. Based on the foregoing, we find that Section 8.14 of the Orangetown Code materially limits reception and transmission under Section 25.104 of the Commission's rules, and that Orangetown has failed to demonstrate the ordinance is reasonable. It has not shown that the ordinance furthers aesthetic objectives given that ASCI's lot and surrounding areas are zoned light industrial and that the view of the proposed new antenna will largely be shielded from view by residences in the area. Nonetheless, even assuming the ordinance furthers some aesthetic objective, Orangetown has not shown that the ordinance does not unnecessarily burden the federal interest in ensuring access to satellite services. Therefore, we preempt the Orangetown ordinance as it applies to ASCI's application.

ORDERING CLAUSE

17. Accordingly, IT IS ORDERED, pursuant to 47 C.F.R. § 0.261 and § 25.104, that the Petition for Declaratory Relief filed by Atlantic Satellite Corporation, Inc. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donald Abelson
Chief, International Bureau